



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 22, 1997

Mr. Michael Spurlock
General Counsel
El Paso Water Utilities
Public Service Board
P.O. Box 511
El Paso, Texas 79961-0001

OR97-2823

Dear Mr. Spurlock:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111135.

The El Paso Water Utilities Public Service Board (the "board") received two requests for a copy of the license agreement between the board and its selected customer service and billing system supplier, Systems & Software, Inc. ("S&S"). We have combined these two requests into one ruling with the above-referenced identification number. You assert that the information is excepted from disclosure pursuant to sections 552.101, 552.104 and 552.110 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 552.104 is generally invoked to except information relating to competitive bidding situations involving specific commercial or contractual matters. Open Records Decision No. 463 (1987). Governmental bodies may withhold bid information while governmental officials are in the process of evaluating the proposals and asking competitors to clarify their bids. Open Records Decision No. 170 (1977). Section 552.104 does not, however, except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978). As you inform us the board has awarded the contract for the new Customer Information System, we conclude you may not withhold the requested information pursuant to section 552.104.

Pursuant to section 552.305 of the Government Code, we notified S&S of the requests for information and of its opportunity to claim that the information at issue is excepted from disclosure. S&S responded by asserting that portions of the requested information are confidential as trade secrets and proprietary information and therefore are excepted from disclosure pursuant to section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Upon review of the arguments by S&S and the information submitted, we conclude that S&S has met its burden in establishing that much of the information it has marked is confidential as trade secret or commercial or financial information. We have marked the information that must be released. In this regard, we note that S&S seeks to withhold resumes and personnel information of employees of S&S. Prior decisions of this office have determined that section 552.110 is inapplicable to resumes listing the education and experience of employees. *See* Open Records Decision Nos. 309 (1982), 306 (1982). In addition, we note that federal cases applying the analogous FOIA exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Consequently, the board may not withhold this information from public disclosure based on the commercial or financial information prong of section 552.110 of the Government Code. *See* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 111135

Enclosures: Marked documents

cc: Mr. David Dalbo
1969 Starfire Dr.
Atlanta, Georgia 30345
(w/o enclosures)

Mr. Ben J. Rosenberg
HTE
1000 Business Center Drive
Lake Mary, Florida 32746
(w/o enclosures)

Mr. David Decker
Systems & Software, Inc.
Griswold Industrial Park
46 Williston Road
Williston, Vermont 05495
(w/o enclosures)
(w/o enclosures)